NO. 80-836

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES GREGG SIMMONS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the Georgia firearms laws improperly shift the burden of proof to a defendant.

2.

Whether the burden of proof was impermissibly shifted to the Petitioner under the facts and charge in the instant case.

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PART ONE

STATEMENT OF THE CASE

Petitioner, James Gregg Simmons, was indicted by the Superior Court of Colquitt

County, Georgia, on July 10, 1979. Petitioner was charged with the possession of a machine gun in violation of Ga. Code Ann. § 26-2906 and with possession of a silencer in violation of Georgia Firearms and Weapons Act. Petitioner received a jury trial on these charges. At the conclusion of the State's case, Petitioner attacked the constitutionality of the statutes challenged in the instant petition by way of a motion for a directed verdict. This motion was overruled. Petitioner was subsequently convicted by the jury and sentenced on September 12, 1979, to five years imprisonment on each of the two counts.

Petitioner filed a motion for new trial which was overruled by the trial court on October 29, 1979. Subsequently, Petitioner appealed to the Court of Appeals of Georgia.

Simmons v. State, 154 Ga. App. 234, 267 S.E.2d 806 (1980). In his appeal to that Court, Petitioner again raised the constitutional challenge to the Georgia statutes. The Court of Appeals determined that the Petitioner's constitutional challenge had not been properly pursued in the trial court and, thus, could not be raised on appeal. The Court of Appeals went on to note that the Petitioner did not deny that he purchased the machine gun and silencer, but merely asserted that there was nothing to refute his testimony that he acted with innocent belief that he could register these items. The Court of Appeals noted that this testimony was contradicted by the dealer who actually sold the weapons to the Petitioner in which the dealer asserted that the Petitioner wanted items other than the machine gun and silencer.

The dealer further testified that the Petitioner and his codefendant made statements that they were having problems with some shipments of contraband coming out of South America. Simmons, 154 Ga. App. at 235.

The Petitioner subsequently filed a petition for a writ of certiorari in the Supreme Court of Georgia again attacking the constitutionality of certain of the firearms laws in Georgia. The Supreme Court of Georgia determined that the constitutional challenge had been properly made and that the Court could consider the statutes. The Supreme Court noted that Ga. Code Ann. § 26-2906 specifies that it is a felony to possess a machine gun. Ga. Code Ann. § 26-2907 sets out certain statutory exemptions to the aforementioned statute. The Court noted that this section did not shift the burden

of proof, but merely stated that the prosecution "need not negative any exemptions." The Court found that the issue as to the shifting of the burden of proof was not raised by these two code sections. The Court also found that the trial court placed no burden of proof on the Petitioner as to either of the laws in question by the trial court's charge.

The Supreme Court of Georgia then considered Petitioner's conviction concerning the possession of the silencer. In relation to this conviction, Ga. Code Ann. § 26-9915a does provide that the burden of proof of any exception is upon the defendant. The Court determined that this provision was not unconstitutional in light of Patterson v. New York, 432 U.S. 197 (1977). The Court also noted that in the instant case, the trial court did not charge that the burden

of proof of an exemption was upon the Petitioner. The Supreme Court noted that all statutory language as to negating exemptions and the statutory burden of proof upon the defendant was omitted in the trial court's charge. The Court also noted that the trial court did not even charge the jury as to exemptions because no evidence was produced in this regard. Once the jury asked for a clarifying instruction as to any exemptions, the Court merely charged the exemptions listed under Ga. Code Ann. § 26-2907 and Ga. Code Ann. § 26-9914a(d) as to machine guns and silencers. The Supreme Court of Georgia thus found that there was no burden shifting or burden reducing charge given as to the exemptions. The Supreme Court of Georgia thus affirmed the conviction. Simmons v. State, 246 Ga. 390, __ S.E.2d __ (1980).

Petitioner now seeks review in this Court in an attempt to again challenge the same

portions of the firearms laws of the State of Georgia.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE GEORGIA FIREARMS LAWS DO NOT IMPROPERLY SHIFT THE BURDEN OF PROOF TO A DEFENDANT.

Petitioner has alleged that certain provisions of the Georgia laws concerning firearms violate the Fourteenth Amendment. Petitioner relies on this Court's decisions in Sandstrom v. Montana, 442 U.S. 510 (1979) and Mullaney v. Wilbur, 421 U.S. 684 (1974), as well as others. Respondent asserts that none of the statutory provisions cited by the Petitioner create an unconstitutional presumption or burden shifting condition.

Petitioner asserts that the mere possession of a machine gun or a silencer is not a crime and that before it can be a crime, the

possession must fall outside of one of the statutory exceptions. Respondent asserts that Petitioner has misconstrued the statutory scheme of the State of Georgia in regard to firearms.

In considering the firearm laws of Georgia, it is clear that under Ga. Code Ann. § 26-2904, an individual can procure a license to carry any pistol or revolver. This code section does not extend to any other type of firearm. This section relates specifically to those sections making the carrying of a pistol or revolver without a license a crime. This code section does not make any reference to the type of weaponry involved in the instant case.

Under Ga. Code Ann. § 26-2906, the mere possession or carrying of a machine gun is a felony in the State of Georgia and is

punishable by a sentence of one to five years. Thus, contrary to Petitioner's contention, the mere possession of a machine gun is a crime in the State of Georgia. Ga. Code Ann. § 26-2907 goes one step further and provides certain exemptions or defenses to the crime of possessing or carrying a machine gun. In this section, certain specific persons are excluded from the previously mentioned law by virtue of their occupation. This code section does provide that the prosecution need not negative any of these exemptions in proving its case. In a case of possession of machine gun, it is clear that these exemptions do not constitute elements of the crime. The mere possession of the machine gun is a violation of Ga. Code Ann. § 26-2906. The exemptions are not elements required to be proven by the prosecution, but are defenses to be established by a defendant.

Similar provisions exist regarding silencers in Ga. Code Ann. § 26-9911a. This provision states that no person shall have a silencer in his possession except as provided in Section 26-9914a. Ga. Code Ann. § 26-9912a specifies that a person "commits an unlawful possession of firearms or weapons when he knowingly has in his possession any sawed-off shotgun, sawed-off rifle, machine gun, dangerous weapon or silencer, as defined in this law. . . ." Ga. Code Ann. § 26-9914a provides exceptions to these latter provisions of the law. Under these provisions, which are specifically included under the Georgia Firearms and Weapons Act, contrary to the earlier provisions mentioned, the burden of proof of any exception is placed upon the defendant as well as stating that the prosecution need not negative any exception.

Before determining the constitutional issues presented by the Petitioner in the instant case, this Court must consider the constitutional issues reached and decided by the state courts. The state court did address §§ 26-2906 and 26-2907. The Court noted that under the criminal code, these provisions merely provide that the prosecution need not negative any exemption. Thus, these code sections do not improperly shift the burden of proof to a defendant. These sections set out a crime and the elements of that crime, then provide certain exceptions to this crime. These exceptions do not relate to the elements of the crime. Furthermore, as noted by the Supreme Court of Georgia, no burden of proof was placed on the Petitioner as to either of these two provisions of the law. Thus, Petitioner's contention as to his conviction of possession of machine gun is clearly without merit.

In considering the conviction for possession of a silencer, the Supreme Court of Georgia addressed the Firearms and Weapons Act of Georgia. This statute does provide that the burden of proof is on a defendant, but does not state the degree. The Court found that this provision was not unconstitutional, but went on to note that this burden of proof was not given to the jury in the trial court's charge. Thus, although the statute itself may shift the burden of proof, the Court did not shift the burden of proof in the instant case.

Respondent asserts that the mere statement that the prosecution is not required to negative an exception or exemption is clearly permissible under the decisions of this Court. The same type of provision has been challenged in the drug laws of Georgia under Title 79 A.

Similar statutes in regard to drugs exist in other states. In United States ex. rel. Kirchner v. Johnstone, 554 F.Supp. 14 (E.D. Pa. 1978), the Court considered a similar provision in the Pennsylvania Code where no evidence was presented by the prosecution that the defendant did not fall within a statutory exception. The Court noted that the key question was whether the exception was an essential element of the crime. The district court went on to note that it had been interpreted that the provision was not an element of the crime, but a personal defense. The Court noted that the exemption clauses did not refer to conduct which might be an element of the crime, but to persons who would be exempted. Similarly, in the instant case, the exceptions noted in the statutes do not refer to conduct and thus, to elements of the crime, but to specific persons who do not fall within the statutory prohibition.

A similar statutory provision exists in the federal code at 21 U.S.C. § 885(a)(1), which provides that the United States is not required to negative an exception or exemption under that chapter. The Seventh Circuit Court of Appeals found that if a defendant came within an exception or exemption in the statute, it was necessary for him to set up and establish it as a defense. United States v. Rowlette, 397 F.2d 475 (7th Cir. 1968); See McKelvey v. United States, 260 U.S. 353 (1922). The Court noted that exemptions and exceptions in that statute would be equated with affirmative defenses and would be a matter peculiarly within the knowledge of a defendant. The Court further noted that a defendant could be expected to produce the proof of those exceptions or exemptions.

Similar to these various statutes, the Criminal Code of Georgia allows certain exemptions or exceptions to the crime of possession of a machine gun and possession of a silencer. As in the above cited cases, it is clearly permissible to require a defendant to produce some sort of proof as to these exemptions. These exemptions are in the nature of affirmative defenses and do not constitute elements of the offense. Thus, there is no burden shifting concerning the elements of the crime themselves. Under Georgia law, it is not the "unlawful possession" of a machine gun or silencer that is a crime, but it is the mere possession of either one of these items that is a crime. Once the State has proven the necessary elements to show the possession, the defendant can then establish that he was authorized under the law to have these items in his possession.

The burden of going forward with the evidence can properly be placed on the defendant after the prosecution has "proven enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge, the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." Speiser v. Randall, 357 U.S. 513, 524 (1958).

Respondent submits that the Supreme Court of Georgia properly determined that there was no impermissible shift of the burden of proof in the instant case. It is clear that the statutes in question set forth a crime and then provide certain defenses available to a defendant to this crime. Thus, as these exeptions are not elements

of the crime, the statutes are not unconstitutional in violation of the Fourteenth Amendment. Respondent submits that this Court should decline to review the decision of the Supreme Court of Georgia.

B. UNDER THE FACTS OF THE INSTANT CASE, NO BURDEN WAS IMPERMISSIBLY SHIFTED TO THE PETITIONER.

Even if this Court were to take issue with the wording of some of the statutes in the instant case, it is clear, as noted by the Supreme Court of Georgia, that no burden was ever shifted to the Petitioner by the trial court. The Supreme Court of Georgia thoroughly considered the charge of the trial court and found that the Court did not charge concerning the burden of proof of the exceptions or concerning the negativing of such exemptions. The exemptions were charged after the jury asked for a clarifying instruction. This time, the Court merely gave the exemptions applicable to machine guns under Ga. Code Ann. § 26-2907 and the exemptions applicable to machine guns and silencers from Ga. Code Ann. § 26-9914a(d). Thus, no burden shifting

or burden reducing charge as to the exemptions was given to the jury. Under this specific charge, Respondent asserts that there has clearly been no impermissible shift in the burden of proof or persuasion and that this Court should decline to grant certiorari.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, James Gregg Simmons.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the respondent upon the Petitioner by depositing a copy of same in the United States Mail with proper address and adequate postage to:

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This 24th day of December, 1980.

/s/
JOHN C. WALDEN